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FILED
JUL 30 1959
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SUPREME COURT OF THE UNITED STATES OF AMERICA

No. 263

MORRIS DIAMOND,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to Review Decision of United States Court of Appeals, Fifth Circuit — and Supporting Brief

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SUPREME COURT OF THE UNITED STATES OF AMERICA

No.

MORRIS DIAMOND,

Petitioner.

versus

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to Review Decision of United States Court of Appeals, Fifth Circuit

JURISDICTIONAL STATEMENT

It is respectfully submitted that in the petitioner's belief this honorable court has jurisdiction to review the decision rendered in this case by the United States Court of Appeals for the Fifth Circuit by virtue of the following:

Title 28, Section 1254 (1)

"Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;****"

STATEMENT OF MATTER INVOLVED

The matter involved here is the dismissal of this action by the United States District Court in and for the Southern District of Florida, Miami Division, which dismissal was "without prejudice" at the request of the United States of America, the original plaintiff, without notice to Morris Diamond, the original defendant, or his attorney of record, which dismissal "without prejudice" occurred on the eve of the afternoon of the date set for trial.

The United States Court of Appeals for the Fifth Circuit determined that the dismissal in question was erroneous and remanded the cause for hearing on the original plaintiff's motion to determine whether or not the cause should have been dismissed "without prejudice" and, if so, upon what terms and conditions, if any.

It is here contended that the appellate court should have vacated the order entered by the district court and dismissed the proceedings "with prejudice."

FACTS

In brief, the facts in this case are that a denaturalization proceedings was filed against the original defendant on September 18, 1956, even though the affidavit of "good cause" was executed practically two years previ-

ous. The defendant did everything incumbent upon him to do in defense of the action, including his having submitted his person to the taking of a deposition by the Government, he prepared for his defense, interviewed out-of-town witnesses at much expense and inconvenience, engaged the undersigned to defend him, suffered much embarrassment and humiliation by virtue of the pendency of this action.

The cast was set for final hearing and trial, by the district court, for 9:30 A.M., August 26, 1958 (TR 18). On the afternoon of August 25, 1958 (TR 19) the district court, on motion of the plaintiff, dismissed the action as above stated without any notice having been given to the defendant, or without any reason for such dismissal having been offered by the plaintiff or announced by the district court. A motion by the defendant for modification of the order of dismissal (TR 23-24) was heard and denied on October 22, 1958 (TR 25) again without any offer or announcement of any reason by the plaintiff who was represented at this hearing) or the court for the denial of this motion.

On August 27, 1958, two days following the "without prejudice" dismissal of this action, another denaturalization proceedings was filed against the defendant, identical to the one filed against him on September 18, 1956, thus commencing anew the embarrassment, harrassment and humiliation of these proceedings (TR 20). The latter proceedings were stayed on November 20, 1958, by the district court, pending receipt by the clerk of the district court of the mandate from the United State Court of Appeals (TR 32).

QUESTION INVOLVED

These proceedings, being neither criminal nor ordinary civil proceedings, but proceedings which involve a forfeiture, that is forfeiture of citizenship,

> United States versus Stromberg (15572), decided November 15, 1955, in 227 Fed. 2d, 903, and in Schneiderman versus United States, decided June 21, 1943, 320 U. S. 118, 160, 63 S. Ct. 1333, 1353, 87 L. Ed. 1796

does not, the defendant having answered the complaint (TR 15-17) wherein he denied the allegations of the complaint (TR 1-7) and his having prepared for his defense as above stated, amount to an equivalent of a plea of not guilty in a criminal case, in which instance if the Government were to dismiss the action, the dismissal should have been "with prejudice".

Wherefore, it respectfully prayed that this honorable court grant the writ of certiorari herein sought, review the action of the district court and appellate court, and finally order the dismissal of the original proceedings "with prejudice."

Dated at Miami, Dade County, Florida, July 24, 1959.

Respectfully submitted,

LOUIS A. SABATINO
Attorney for Petitioner
923 duPont Building
Miami 32, Florida

APPENDIX

JUDGMENT

Extract from the Minutes of May 19, 1959.

MORRIS DIAMOND,

No. 17548. versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of dismissal of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court in order that a hearing may be had upon the motion and a determination made, in the discretion of the court, as to whether or not the cause should have been dismissed without prejudice and, if so, upon what terms and conditions, if any.

APPENDIX

In The

United States Court of Appeals

For The Fifth Circuit

No. 17548

MORRIS DIAMOND,

Appellent,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(May 19, 1959.)

Before JONES, BROWN and WISDOM, Circuit Judges.

JONES, Circuit Judge: The United States brought a proceeding to revoke the naturalization of Morris Diamond, the appellant. In the complaint it was charged that Diamond, in the proceeding by which he was

naturalized, made false statements regarding the use of a name other than his own and with respect to his having been arrested or charged with violation of the law. Diamond submitted interrogatories. There were answered. The defendant answered. On July 17, 1958, the Government took Diamond's deposition. The case was set for trial on August 26, 1958. The day before the case was to be tried the United States Attorney moved that the cause be dismissed without prejudice. No notice of the motion or of a hearing on it was given to Diamond. The motion was granted and the case was dismissed without prejudice. On the following day, August 27, 1958, the United States Attorney filed another complaint against Diamond in the same or substantially the same language as the first. On August 28, 1958, Diamond filed a motion to modify the order of dismissal so that it would be with prejudice. This motion was denied. Diamond has appealed from the order of dismissal. He says he was ready for trial the expense of preparation had been incurred, and the pendency of the proceedings had been an occasion of excessive worry and embarrassment to him. He insists that the dismissal was proper but that it should have been with prejudice rather than without prejudice. The Government, on the other hand, urges that the granting of the motion to dismiss under the circumstances of this case was discretionary and, no abuse of discretion being shown, there should be an affirmance of the court's order.

With some exceptions an action may be dismissed before the adverse party has answered or moved for summary judgment "by filing a notice of dismissal". Rule 41 (a) (1) Fed. Rules Civ. Proc., 28 U.S.C.A. The provision of the Rules here applicable is:

"Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." Rule 41 (a) (2), Fed. Rules Civ. Proc. 28 U.S.C.A.

Under Rule 41 (a) (1) dismissal of an action may be effected by the filing of notice and no order of court is required. Notice to the defendants is not required in such a [illegible] 1948, 80 F. Supp. 541. Under Rule 41 (a) (2) an order is essential. This contemplates the filing of a motion as was done here. 2 Baron & Holtzoff, Federal Practice and Procedure, Rules Ed. 618, § 912. Motions, except those which may be heard ex parte, shall be served on the adverse party. Rule 5 (a) Fed. Rules Civ. Proc. 28 U.S.C.A. Where terms and conditions may be imposed a hearing should be had at which the views and claims of the defendant may be asserted. Cf. 27 C.J.S. 248, Dismissal and Nonsuit, § 71. Particularly is this true where the granting or denial of the motion is in the court's discretion.

It has been held that the only discretion which the court can exercise under Rule 41 (a) (2) is as to "the

and conditions but not as to the right of a plaintiff to have entered an order of dismissal without prejudice. *Bolten v. General Motors Corporation*, 7th Cir. 1950, 180 F. 2d 379, 21 A.L.R. 2d 623, cert. den. 340 U. S. 813, 71 S. Ct. 41, 95 L. Ed. 598. The decision so holding has been criticized. *Ockert v. Union Barge Line Corporation*, 3rd Cir. 1951, 190 F. 2d 300, 301. The better rule and that represented by the weight of authority is that the court may, in the exercise of its discretion, deny the motion or grant it and if it be granted such terms and conditions may be imposed as are proper. *Home Owners Loan Corporation v. Huffman*, 8th Cir. 1943, 134 F. 2d 314, cert. den. 316 U. S. 681, 62 S. Ct. 1268, 86 L. Ed 1754, cited in *Cone v. West Virginia Pulp & Paper Co.*, 330 U. S. 212, 67 S. Ct. 752, 91 L. Ed. 849; *Westinghouse Electric Corporation v. United Electrical, R. Workers*, 3rd Cir. 1952, 194 F. 2d 770; cert. den. 343 U. S. 766, 72 S. Ct. 1060, 96 L. Ed. 1362, and see *Ockert v. Union Barge Line Corporation*, *supra*, and cases cited therein and in Annotation at 21 A.L.R. 2d 627.

The order of dismissal will be vacated and the cause will be remanded in order that a hearing may be had upon the motion and a determination made, in the discretion of the court, as to whether or not the cause should have been dismissed without prejudice and, if so, upon what terms and conditions, if any.

VACATED and REMANDED.

PETITIONER'S SUPPORTING BRIEF

The opinion and decision by the United States Court of Appeals for the Fifth Circuit in this case is that which appears in the appendix of the petition for writ of certiorari heretofore appearing.

The grounds on which jurisdiction of this court is sought to be revoked is as follows:

Title 28, Section 1254 (1)

"Courts of appeals; certiorari; appeal, certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ....."

The order of dismissal here complained of was in all probability, based on Federal Rule of Civil Procedure No. 41 (a) (2) entitled "Voluntary Dismissal; Order of Court" which reads as follows:

"Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant ..."

to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

The question here presented for review is whether or not the appellate court should have dismissed the original proceedings made a subject matter of this petition "with prejudice" rather than having vacated the order of dismissal of the district court and remanded the same for further proceedings.

ARGUMENT

It is the petitioner's contention that the appellate court has agreed by its decision that the original case could not have been dismissed "without prejudice" since there was no notice to the defendant of the motion thereand since there was no adequate or obvious reason to dismiss the action "without prejudice"—the matter of this dismissal was before the trial judge on two occasions and on neither of these occasions did the Government show reason; evidently the Government had no reason. Consequently, if it had no reason for a continuance or a of dismissal which would permit it to re-institute proceedings, the dismissal should have been "with prejudice" in view of the well established rule that a plaintiff is not licensed to amuse himself at the defendant's expense, to harass the defedant, and prolong litigation.

As pointed out in Moore's Federal Practice, Volume 5, page 1021, in discussing Rule 41 (a) (2), where no sufficient reason is given for the dismissal, the dismissal without prejudice should not be allowed.

Wall v. Connecticut Mutual Life Ins. Co. (SD Ga 1941) 5 FR Serv 41A 22, Case 5, 2 FRD 244; Golconda Petroleum Corp. v. Petrol Corp. (SD Cal 1942) 6 FR Serv 24a 2, Case 2.

CONCLUSION

The petitioner therefore respectfully submits that the petition for certiorari here prayed for should be granted by this honorable court, these proceedings reviewed, and the order of dismissal entered by the trial court should be modified from one of "without prejudice" to one of "with prejudice", without the necessity of further proceedings or opportunity to the Government to now look for an excuse or reason it should have had a year ago.

Respectfully submitted.

Louis A. Sabatino
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The undersigned hereby certifies that he has on July 27, 1959, mailed by U. S. Mail, five copies of the foregoing petition for writ of certiorari and supporting brief, to the Solicitor General, Department of Justice, Washington 25, D. C.

Louis A. Sabatino

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In the [redacted]

[redacted]

OF PETITION FOR [redacted]
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Grivas v. *Parmelee Transp. Co.*, 207 F. 2d 334, certiorari denied, 347 U.S. 913 — 4

Home Owners' Loan Corp. v. *Huffman*, 134 F. 2d 314, certiorari denied, 316 U.S. 681 — 4

Hydraulic Press Mfg. Co. v. *Williams, White & Co.*, 165 F. 2d 489 — 4

Klapprott v. *United States*, 335 U.S. 601 — 4

Schneiderman v. *United States*, 320 U.S. 118 — 4

United States v. *Lyman*, 125 F. 2d 67 — 4

Rule:

Federal Rules of Civil Procedure:

Rule 41(a)(2) — 2, 4

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 263

MORRIS DIAMOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 6–9) is reported at 267 F. 2d 23.

JURISDICTION

The judgment of the court of appeals was entered May 19, 1959 (Pet. App. 5). The petition for a writ of certiorari was filed July 30, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

On the motion of the United States Attorney, without notice to the defendant, the district court dismissed, before trial, an action for denaturalization without prejudice. On appeal, the court of appeals remanded the cause for a hearing as to whether or

not the cause should have been dismissed without prejudice and on what terms and conditions. The question presented is whether the court of appeals should itself have directed a dismissal with prejudice.

RULE INVOLVED

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides:

> (2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

STATEMENT

In September 1956, the United States instituted an action in the District Court for the Southern District of Florida seeking to cancel a certificate of naturalization issued to petitioner on the ground that petitioner had deliberately made false statements and concealed material facts in the proceedings leading to naturalization (R. 1–7). Petitioner's answer was filed August 14, 1957 (R. 15–17), and the case was set for trial on August 26, 1958 (R. 18). The United States Attorney, on the day before trial, without notice t

petitioner, moved to dismiss the case without prejudice, and the district court granted the motion (R. 19).

The United States, on August 27, 1958, filed a new complaint which was the same as the former complaint (R. 20–22). Petitioner then moved, on August 28, 1958, for modification of the prior order of dismissal to provide that the dismissal be with prejudice. He alleged that the proceedings up to the time of dismissal had been of substantial expense and of considerable worry to him (R. 23–24). The district court denied the motion (R. 25).

On appeal from that denial, the court of appeals held that under Rule 41(a)(2), F.R. Civ. P., the order of dismissal should not have been entered without notice to petitioner. It accordingly vacated the order of dismissal and remanded the cause "in order that a hearing may be had upon the motion and a determination made, in the discretion of the court, as to whether or not the cause should have been dismissed without prejudice and, if so, upon what terms and conditions, if any" (Pet. App. 5).

ARGUMENT

Petitioner asks this Court to review the order of the court of appeals remanding the cause for a hearing as to whether the dismissal should be with or without prejudice. He claims that the court of appeals should itself have directed a dismissal with prejudice. There is no occasion, however, for this Court to review the matter at this interlocutory stage. A proceeding to cancel a certificate of naturalization is a civil suit. *Klapprott* v. *United States*, 335

U.S. 601, 612; *Schneiderman* v. *United States*, 320 U.S. 118, 160. Because the dismissal was before trial, it would, under Rule 41(a)(2), F.R. Civ. P., *supra*, p. 2, normally be without prejudice. The court of appeals has ruled that it was error to permit the dismissal without giving petitioner an opportunity to be heard and has held that the district court may require a dismissal with prejudice, if the circumstances so warrant. It is not, however, the province of the court of appeals, or of this Court, to decide in the first instance and without any hearing whether the case should be dismissed "with prejudice," since Rule 41(a)(2) vests this discretion in the district court. *Grivas* v. *Parmelee Transp. Co.*, 207 F. 2d 334, 338 (C.A. 7), certiorari denied, 347 U.S. 913; *United States* v. *Lyman*, 125 F. 2d 67, 70 (C.A. 1); *Butler* v. *Denton*, 150 F. 2d 687, 690 (C.A. 10); *Hydraulic Press Mfg. Co.* v. *Williams, White & Co.*, 165 F. 2d 489, 495 (C.A. 7); *Home Owners' Loan Corp.* v. *Huffman*, 134 F. 2d 314, 317 (C.A. 8), certiorari denied, 316 U.S. 681.

CONCLUSION

For the reason stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

SEPTEMBER 1959.

U.S. GOVERNMENT PRINTING OFFICE